82-462

No. ...

IN THE

Supreme Court of the United States

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October Term, 1982

INSURANCE & PREPAID BENEFITS TRUST FOR

(a) MANUFACTURING INDUSTRIES AND RELATED SERVICES AND SUPPLIERS,

(b) RETAIL & WHOLESALE INDUSTRIES AND RELATED SERVICES AND SUPPLIERS,

(c) DISTRIBUTION INDUSTRIES AND RELATED SERVICES AND SUPPLIERS,

(d) CONSTRUCTION INDUSTRIES AND RELATED SERVICES AND SUPPLIERS,

(e) SERVICE INDUSTRIES AND RELATED SERVICES AND SUPPLIERS,

Petitioners,

vs.

RAYMOND J. DONOVAN,* SECRETARY OF UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, DISTRICT FOUR, DIVISION TWO.

GEORGE L. ROGERS of
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**Pursuant to Fed.R.App. P. 43, Raymond J. Donovan has been substituted for Ray Marshall as Secretary of Labor.*

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Questions Presented.

A. May Multiple Employers maintain an employee welfare benefit plan to provide health care to their employees?

B. Should a Writ of Mandate issue when the Department of Labor erroneously interprets federal law for the purpose of having the California Department of Insurance issue a cease and desist order thereby preventing multiple employers from maintaining an employee welfare benefit plan to provide health care for their employees?

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VICES AND SUPPLIERS, (c) DISTRIBUTION INDUSTRIES AND RELATED SERVICES AND SUPPLIERS, (d) CONSTRUCTION INDUSTRIES AND RELATED SERVICES AND SUPPLIERS, (e) SERVICE INDUSTRIES AND RELATED SERVICES AND SUPPLIERS pray that a Writ of Certiorari issue to review the judgment and opinion of the United States District Court and United States Court of Appeals for the Ninth Circuit to clarify and interpret the law in the area of health and care providing.

I.
OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the United States District Court is reproduced in Appendix A. The Memorandum of the Ninth Circuit Court of Appeals is reproduced in Appendix B. A Petition for Rehearing was denied and is reproduced in Appendix C.

II.
JURISDICTIONAL STATEMENT.

The date of the judgment and the entry thereof of the Ninth Circuit Court of Appeals sought to be reviewed is July 15, 1982. An order denying a rehearing was entered on August 11, 1982. The statutory provision believed to confer jurisdiction on this court to review the judgment in question is Section 1254 of Title 28 of the United States Code and United States Supreme Court Rules, Rule 19-1(b) where a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

III.
STATUTE.

29 U.S.C. § 1002(1).

IV.
STATEMENT OF THE CASE.

Petitioners are industry trusts formed in December, 1977 and maintained by multiple employers to provide health care (RT p. 29 lines 10-12; p. 38, lines 1-2).[1] The employers contribute dues each month to the trust. The Benefit Committee/Trustee represent the employers (RT p. 46 lines 1-3; p. 85 lines 22-25). The employees have a choice of seeking health care services from their doctor in which case a percent of the bill is paid the same as medical insurance or the employee may obtain health care services from a provider of services under contract with the Petitioners in which case a greater portion of the entire bill is paid. (RT p. 62 lines 19-24; p. 65 lines 9-10; p. 67 line 20). In order to collect the dues and to obtain, process and pay claims the Petitioners hired an administrator, Insurance Benefits, Inc., a California corporation (RT p. 25 line 24).

For many years the Petitioners hounded the United States Department of Labor for an advisory letter and guidance as to their status under the Employee Retirement Income and Security Act of 1974 (E.R.I.S.A.) (RT p. 103 line 5 to p. 104 line 7). On July 23, 1979 the Department of Labor wrote as follows:

> It is the Department of Labor's view, based on the definitional provisions of ERISA as well as the overall statutory scheme, that a multiple employer plan exists where a cognizable group or association of employers establishes a benefit program for the employees of member employers or where several employers and one or more employee organizations jointly establish such a program, or where several employers contribute to a plan established by an employee organization. In

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[1]As used herein, "RT" refers to the Reporter's Transcript.

> each of these contexts there is some organization relationship among the employers, or the employees, or both in coming together and establishing a single plan. But where several unrelated employers, in establishing benefit programs for their unrelated employees, without any concerted 'sponsor' or 'settlor' activity, merely execute identically worded 'trust agreements,' 'subscription agreements,' or similar documents offered by an independent third party as a means to fund benefits, no multiple employer plan can be recognized. (EOR 1 pp. 17 and 18.)[2]

In addition to the letter being highly publicized, the United States Department of Labor on October 31, 1980 wrote to the National Association of Insurance Commissioners that a state insurance commission did not need Department of Labor approval to regulate multiple employer trusts. Cf. CCH Pension Plan Guide, paragraph 2289.

After trial, the Honorable ROBERT M. TAKASUGI ruled:

> This court finds that there was an 'association of employers' for purposes of ERISA. All participating employers had knowledge of the 1977 restructuring of IBT (i.e., its transformation into an ERISA plan) and voluntarily chose to participate in the new trust intending to provide employee benefits. Therefore, these participating employers formed an 'association' of employers insofar as they had joined together for a specific purpose. (p. 5 lines 15-22)

Prior to commencing trial, the trial judge indicated the sole issue was the correctness of the July 23, 1979 letter of the Department of Labor and that the issues of the relationship between IBT and IBI and the type of participating

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[2]Excerpts of Record will be cited "EOR."

groups would not and could not be an issue (RT p. 24 line 18 to p. 25 line 4).

However, the trial judge then ruled against Petitioners because of the possibility of abuse by IBI because of its agreement with IBT, which agreement was changed and the objectionable paragraph deleted before trial and because of the over-broad definition of employer, neither of which were issues in the July 23, 1979 letter.

The Ninth Circuit Court of Appeals in a memorandum decision found that:

> The Department of Labor exercised its discretion when it issued its opinion letter. Mandamus is not available, however, unless the act to be compelled is mandatory or ministerial. *Wilmot v. Doyle*, 403 F.2d 811, 816 (9th Cir. 1968). *See also Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 35-36, 101 S.Ct. 188, 190 (1980).
>
> We also agree with the district court's finding that the power to make final decisions rested in IBI rather than in IBT. The other issues raised on appeal are not properly before us due to the limited scope of review of a denial of mandamus.

Thus, the technical question is if mandamus lies to correct an erroneous interpretation of federal law by a federal regulatory agency when the agency has no duty to interpret the law but elects to interpret the law and does so incorrectly.

The real policy question before the court is if the small interstate corporate employers may bind together to provide health care free from the regulation of the State Insurance Commissioners but subject to regulation by the United States Department of Labor.

V.
BASIS FOR JURISDICTION IN TRIAL COURT.

Federal Jurisdiction and venue were invoked under Title 28, Section 1331, Title 28, Section 1361, Title 28, Section 2201, Title 29, Section 1332, and Title 5, Section 701 *et seq.*, all of the United States Code. Jurisdiction was also conferred upon the court in that a federal question arose from a dispute over the interpretation of a federal statute, 29 U.S.C. § 1001, *et seq.*

VI.
ARGUMENT.

A. Multiple Employer Trusts May Maintain Employee Welfare Benefit Plans to Provide Health Care to Their Employees Under E.R.I.S.A.

29 U.S.C. § 1002(1) provides ". . . Employer Welfare Benefit Plan means any plan . . . maintained by an employer . . . to the extent that such plan . . . is maintained for the purpose of providing for its participants . . . (health care benefits)."

The statute is clear in that it applies to single employers as well as multiple employers. The question is whether or not a Writ of Mandate should issue to correct a misrepresentation of the law when the Department of Labor published a letter claiming the status requires an "organizational relationship among the employers, or the employees, or both in coming together and establishing a single plan."

B. A Writ of Mandate Shall Issue When the Department of Labor Erroneously Interprets Federal Law.

The Department of Labor had discretion to determine whether or not it interprets federal law under E.R.I.S.A. for purposes of declining regulation. However, the Department of Labor has a ministerial duty and mandatory

duty to correctly interpret the law once it exercises its discretion. *Baily v. Romney*, 359 F. Supp. 596 at 599 (1973); *Wilmot v. Doyle*, 403 F.2d 811, 816 (9th Cir. 1968) and *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 35-56, 101 S.Ct. 188, 190 (1980). A Writ of Mandate should issue as it is a ministerial act to correctly interpret federal statutes.

CONCLUSION.

The small employers involved in interstate commerce have been given a uniform law under E.R.I.S.A. free from the interference of the various state insurance regulatory bodies. The cost of the health care is substantially cheaper than the cost of insurance which caters to large businesses. However, the United States Department of Labor has erroneously interpreted the statute under 29 U.S.C. § 1002 by requiring an organizational relationship in the form of something more than an association. Based upon the incorrect interpretation of the law, the Department of Labor refuses to regulate the 11,000 employee participants of Petitioners and the state regulatory agencies namely, the California Department of Corporations and Department of Insurance similarly refuse regulation based upon the law and past decisions namely *Hewlett-Packard Company v. Barnes* (N.D. Cal. 1977) 425 F. Supp. 1294, 571 F.2d 502 (9th Cir. 1978), cert. denied 439 U.S. 831, 99 S.Ct. 108 and *Standard Oil Company of California v. Agsalud, et al.* (1977) 442 F. Supp. 695, 633 F.2d 760 (9th Cir. 1978), cert. denied .... U.S. ....

Consequently, 11,000 participants do not know if they are involved in a legal or illegal health care plan and a void exists which permits IBT to collect funds for health care without regulation and further permits other health plans who may employ unscrupulous individuals to collect funds for health care and expropriate those funds.

For the reasons set forth in this document, Petitioners plead for and respectfully submit that a Writ of Certiorari should issue as prayed and that the judgment of the Ninth Circuit Court of Appeals and the United States District Court should be reversed by the issuance of a Writ of Mandate directed to the United States Department of Labor.

Respectfully submitted,

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Attorney for Petitioners.

APPENDIX A.

Judgment.

United States District Court, Central District of California.

Insurance & Prepaid Benefits Trust, et al., Plaintiffs, vs. Ray Marshall, Secretary of United States Department of Labor, Defendant. No. CV 79-3029-RMT (Px).

Filed: July 21, 1981.

This action having come before this court for a nonjury trial from January 28, 1981 to January 30, 1981, and this court having determined that as of July 23, 1979, plaintiff Insurance and Prepaid Benefits Trust was not an employee benefit plan falling within the scope of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, and this court having filed its Memorandum.

THE COURT HEREBY GRANTS JUDGMENT for defendant and, accordingly, plaintiff's complaint is dismissed with prejudice.

Dated: July 21, 1981.

/s/ Robert M. Takasugi
Robert M. Takasugi
United States District Judge

Memorandum.

United States District Court, Central District of California.

Insurance & Prepaid Benefits Trust, et al., Plaintiffs, vs. Ray Marshall, Secretary of United States Department of Labor, Defendant. No. CV 79-3029-RMT (Px).

Filed: July 21, 1981.

This matter having come before this court for trial on January 28, 1981 through January 30, 1981, and thereupon having been submitted, this court now issues this Memorandum in lieu of findings of fact and conclusion of law pursuant to Rule 55 of the Federal Rules of Civil Procedure.

BACKGROUND

In November 1975, plaintiff Insurance and Prepaid Benefits Trust ("IBT") was formed by Mr. Thomas Wilkie with Mr. Wilkie as trustee. IBT was formed pursuant to state law which required such a trust to be formed as a condition to the issuance of a group insurance policy. Said group insurance policy was sold by Insurance Benefits, Inc. ("IBI"), a company wholly owned by Mr. Wilkie.

In 1977, the 1975 trust document was redrafted, resulting in the division of the single trust into five successor trusts established by five separate trust agreements.[1] Collectively, the five successor trusts are referred to as IBT. The new

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[1] The five successor trusts are (1) Insurance and Prepaid Benefits Trust — Manufacturing Industry and Related Services and Suppliers; (2) Insurance and Prepaid Benefits Trust — Wholesale-Retail Industry and Related Services and Suppliers; (3) Insurance and Prepaid Benefits Trust — Distribution Industry and Related Services and Suppliers; (4) Insurance and Prepaid Benefits Trust — Construction Industry and Related Services and Suppliers; and (5) Insurance and Prepaid Benefits Trust — Services Industry and Related Services and Suppliers. The language and terms of each of the trust documents are identical, except for the names.

trust documents provide for a Benefit Committee to serve as trustees and supervise the operation of IBT.[2] By contract between IBT and IBI, IBI was retained as the contract administrator of IBT.

ISSUES

The sole issue before this court was whether IBT, as of July 23, 1979, fell within the coverage of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*

29 U.S.C. § 1002

29 U.S.C. § 1002(3) provides that an employee benefit plan covered by ERISA includes either an employee welfare benefit plan as defined by 29 U.S.C. § 1002(1) or an employee pension benefit plan as defined by 29 U.S.C. § 1002.[3] Because the parties have stipulated that IBT does

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[2] Each of the five trust documents provides for a Benefit Committee and for the members of the Committee to serve as fiduciaries.

[3] 29 U.S.C. § 1002(1) provides as follows:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(2) provides as follows:

> The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program —
>
> (A) provides retirement income to employees, or
>
> (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

not constitute an employee pension benefit plan, IBT falls within the coverage of ERISA only if it constitutes an employee welfare benefit plan pursuant to § 1002(1).

The parties have stipulated that the types of benefits offered by and through IBT are the types of benefits referred to by § 1002(1). The parties have also stipulated that IBT is not an "employee organization" for purposes of § 1002(1).

Therefore, whether IBT was an ERISA plan on July 23, 1979 rests upon whether or not IBT was ". . . established or maintained by an employer . . . for its participants or beneficiaries." 29 U.S.C. § 1002(1).

I
"ESTABLISHED OR MAINTAINED"

Plaintiff contends that the "maintained" language permits a plan not initially intended to be or not established as an ERISA plan to be transformed into an ERISA plan. Under plaintiff's view, a non-ERISA plan established by an insurance company could be turned over to employers to be "maintained" as an ERISA plan. In the absence of clear case, statutory, or legislative authority to the contrary, this court finds plaintiff's interpretation of "maintain" to be consistent with the statutory language of 29 U.S.C. § 1002(1). A plan, although not originally established as an ERISA plan, may be entitled to ERISA status if it is subsequently restructured as an ERISA plan which complies with the requirements of 29 U.S.C. § 1002(1).

II
"BY AN EMPLOYER"

29 U.S.C. § 1002(5) defines an employer as follows:

> "Any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes *a group or as-*

sociation of employers acting for an employer in such capacity." (Emphasis added.)

Defendant contends that there was no identifiable "group or association of employers" which acted for its member employers and, therefore, IBT was not "established or maintained by an employer." Defendant's contention is apparently based upon the judicial and legislative rejection of multiple employer trusts ("METs") as ERISA plans.

METs are entities utilized by insurance companies to sell group insurance coverage to unrelated groups, i.e., as an insurance funding vehicle. METs are usually characterized by the following: Employers have no business or soccial connections with one another; employers are actively solicited by the insurer; the plan is promoted by the insurer; it is a profit-generating enterprise; and, what this court considers to be most important, all decisions regarding the trust are made by the insurer, i.e., the participating employers possess no *actual* decision-making powers.

The courts have refused to view these METs as being "maintained by an 'association or group of employers acting for an employer.' " The courts and Congress have characterized these METs as mere insurance vehicles established, maintained, and controlled by private insurance companies for the purpose of marketing insurance. *Hamberlin v. VIP Insurance Trust*, 434 F.Supp. 1196 (D. Ariz. 1977); *The Activity Report of the House Committee on Education and Labor*, House Report No. 94-1785, January 3, 1977. *See also Bell v. ESBA*, 437 F.Supp. 382 (D.Kan. 1977); *NBC-EBA v. Anderson*, 451 F.Supp. 458 (S.D. Iowa 1977).

Resolving whether IBT, like a MET, was merely a vehicle to promote and sell insurance, or whether, instead, it was an ERISA trust requires the following factual determinations: a) whether there existed an association of employers; b) whether the Benefit Committee of IBT was representative

of the participating employers; and c) whether the Benefit Committee was the true decision-making body for IBT, independent of and distinct from IBI.

A.

ASSOCIATION OF EMPLOYERS

This court finds that there was an "association of employers" for purposes of ERISA. All participating employers had knowledge of the 1977 restructuring of IBT (i.e., its transformation into an ERISA plan) and voluntarily chose to participate in the new trust intending to provide employee benefits. Therefore, these participating employers formed an "association" of employers insofar as they had joined together for a specific purpose.

B.

BENEFIT COMMITTEE REPRESENTATIVE OF EMPLOYERS

Additionally, this court finds that the participating employers were informed of the formation of the Benefit Committee and were invited to participate in the operation of the Committee and, therefore, also finds that the participating employers either explicitly or implicitly approved of the selection of the members of the Benefit Committee. Hence, the Benefit Committee was representative of the participating employers of IBT.

C.

DECISION-MAKING BODY FOR IBT

However, this court is unable to conclude that the power to make final decisions in IBT matters rested with the Benefit Committee. On the basis of the evidence introduced, including evidence of the Benefit Committee's exercise of control over IBT affairs and the powers delegated to the Committee by the IBT trust documents, this court is inclined

to conclude that the Benefit Committee controlled the affairs of IBT and was free from undue influence or control by IBI. But, Clause 10 in the IBT-IBI "Agreement for Services"[4] compels this court to find that the power to decide IBT matters may well have rested with IBI. Regardless of the validity or scope of Clause 10, it places IBT in a highly disadvantageous position in its relationship with IBI. Although IBI, seemingly, had never utilized this clause for the purpose of influencing or controlling the decisions of the Benefit Committee or the affairs of IBT, the potential existed.

Additionally, this court is troubled by the fact that as of July 23, 1979, the date in question, Mr. Wilkie was chairperson of the Benefit Committee.[5] Although this fact alone is not dispositive of who controlled IBT as of July 23, 1979,

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[4] Clause 10 of the IBT-IBI "Agreement For Services" provides that:

Trade Secrets

10. Organization [IBI] has made a substantial investment and will continue to invest monies to develop and promote Organization's data processing procedures, accounts, records and client information base. During the term of this Agreement, Trust [IBI] will become acquainted with various trade secrets, consisting of compilations of systems, accounts, records, and client information, which are owned by the Organization and which will be regularly used in the operation of the business of the Trust with respect to actual or prospective clients whose identities are not generally known to the public, and specifically not known by competitors and other persons in the same business as Organization. The Trust shall not disclose any of the aforesaid trade secrets, directly or indirectly, or use them in any way, either during the term of this Agreement or at any time thereafter. All files, records of accounts of clients, actual and prospective, documents, equipment data processing systems, disks and tapes, agents lists, and any other records and books relating in any manner whatsoever to the participating employers of the Trust, whether prepared by the Organization or otherwise coming into its possession, shall remain the exclusive property of the Organization regardless of who actually prepared or purchased the item.

[5] Mr. Wilkie resigned from the Benefit Committee on August 15, 1979.

Mr. Wilkie's dual role, as a trustee of IBT and as the owner of the contract administrator IBI, reinforces the possibility that IBI was, in fact, in control of IBT.

Although there existed an association of employers of which the Benefit Committee of IBT was representative, because actual control of the trust could have rested with IBI, this court must conclude that IBT was not a plan "established or maintained *by an employer*."

III
"FOR ITS PARTICIPANTS"

29 U.S.C. § 1002(7) defines a participant as "any employee or former employee of an employer." Employee is defined by 29 U.S.C. § 1002(6) as "any individual employed by an employer."

This court feels that the mere inclusion of individuals who are not eligible for participation in an ERISA plan does not invalidate, as a whole, a plan which otherwise complies with the requirements of ERISA. In such a situation, this court feels that all that would be required is the invalidation of the plan as it pertains to those ineligible participants. However, such an analysis is inapplicable to the instant matter. This court is not confronted with merely the inclusion of ineligible participants, but with an overexpansiveness of terms contained in the trust documents themselves.

This court finds that the definitions of "employee" and "participating employer" contained in the IBT trust documents were too expansive in their scope, specifically and clearly allowing persons ineligible to participate in an ER-

ISA plan to participate in IBT.[6] Although there is evidence that prior to and as of July 23, 1979, contrary to the trust definitions, only persons eligible to participate in an ERISA plan were permitted to become participants of IBT, the wording of the trust documents as of July 23, 1979 did not preclude the future admission and inclusion of ineligible participants.

Because the term "employee" and "participating employer" as defined by the IBT trust documents were overexpansive in their scope, this court concludes that IBT was not established or maintained "for its participants or beneficiaries."

CONCLUSION

This court finds that as of July 23, 1979 IBT was not "established or maintained by an employer . . . for its participants or beneficiaries" as required by 29 U.S.C.

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[6] "Employee" and "participating employer" are defined in the IBT trust documents as follows:

> "*Participating Employer*" — Any individual; employer, whether a corporation, partnership, or sole proprietorship; an association of employers; and association of employees; another trust fund established to provide benefits similar to those of this trust; or otherwise, doing business or organized within the Manufacturing Industry and Related Services and Suppliers, which satisfied such requirements for participation as may be established by the Benefit Committee and which adopts, in writing, this Agreement and agrees to be bound by the terms and conditions thereof as the same may from time to time be amended and modified.
>
> "*Employee*" — Those persons in the service of a participating Employer, including in the case of a sole proprietorship or partnership the sole proprietor or the partners, to the extent provided for by the Benefit Committee. "Employee" shall include members of an employee association or a person in the service of a member of an employer association accepted as a Participating Employer by the Benefit Committee and shall include individuals covered by the previous Trust Agreement or any individuals who become members of or employed by associations or employers which were covered under the preceding Trust or individuals who terminate employment but request conversion or continuation of coverage.

§ 1002(1) and, therefore, was not an employee benefit plan falling within the scope of ERISA.

Dated: July 21, 1981.

/s/ Robert M. Takasugi
Robert M. Takasugi
United States District Judge

APPENDIX B.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

Insurance and Prepaid Benefits Trust, *et al.*, Plaintiffs/Appellants, vs. Raymond J. Donovan,[1] Secretary of the United States Department of Labor, Defendant/Appellee. D.C. No. 79-3029-RMT. No. 81-5780.

Filed: July 15, 1982.

Appeal from the United States District Court for the Central District of California. Robert M. Takasugi, Judge Presiding.

Before: GOODWIN, WALLACE, and PREGERSON, Circuit Judges.

The Department of Labor was asked by Insurance and Prepaid Benefits Trust (IBT) to determine whether IBT constitutes an employee welfare benefit plan under the laws of ERISA, 29 U.S.C. § 1001 *et seq.* in July 1979, the Department of Labor sent IBT an opinion letter setting forth the Department's view that IBT is not an employee welfare benefit plan.

The next month, IBT sued in district court; it sought a mandate ordering the Department of Labor to recognize it under ERISA and declaratory relief determining that IBT is an employee benefit plan under ERISA. Following a bench trial, the district court issued a memorandum in lieu of findings of fact and conclusions of law. The district court determined that Insurance Benefits, Inc. (IBI), the contract administrator of IBT, retained too much power to decide IBT matters. It also concluded that IBT's trust documents contained over-expansive terms which allowed persons in-

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[1]Pursuant to Fed. R. App. P. 43, Raymond J. Donovan has been substituted for Ray Marshall as Secretary of Labor.

eligible to participate in an ERISA plan to participate in IBT. For those reasons, the district court ruled that IBT was not "established or maintained by an employer . . . for its participants or beneficiaries" as required by 29 U.S.C. § 1002 (1) and, therefore, was not an employee benefit plan falling within the scope of ERISA. A denial of mandamus was implicit in this conclusion. IBT filed a timely appeal.

We agree with the district court that mandamus should be denied. The Department of Labor exercised its discretion when it issued its opinion letter. Mandamus is not available, however, unless the act to be compelled is mandatory or ministerial. *Wilmot v. Doyle*, 403 F.2d 811, 816 (9th Cir. 1968). *See also Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 35-36, 101 S.Ct. 188, 190 (1980).

We also agree with the district court's finding that the power to make final decisions rested in IBI rather than in IBT. The other issues raised on appeal are not properly before us due to the limited scope of review of a denial of mandamus.

The judgment of the district court is AFFIRMED.

APPENDIX C.

Order.

United States Court of Appeals for the Ninth Circuit.

Insurance and Prepaid Benefits Trust, et al., Plaintiffs-Appellants, vs. Raymond J. Donovan,[1] Secretary of the United States Department of Labor, Defendant-Appellee. D.C. No. 79-3029-RMT. No. 81-5780.

Filed: Aug. 11, 1982.

Before: GOODWIN, WALLACE, and PREGERSON, Circuit Judges.

Appellant's petition for rehearing is denied.

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[1]Pursuant to Fed. R. App. P. 43, Raymond J. Donovan has been substituted for Ray Marshall as Secretary of Labor.

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No. 82-462

In the Supreme Court of the United States

OCTOBER TERM, 1982

INSURANCE AND PREPAID BENEFITS TRUST, ETC., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly declined to issue a writ of mandamus ordering the Secretary of Labor to declare that petitioners qualify as an "employee welfare benefit plan" within the meaning of Section 3(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-12) is reported at 685 F. 2d 443 (table). The opinion of the district court (Pet. App. 2-10) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1982. A petition for rehearing was denied on August 11, 1982 (Pet. App. 13). The petition for a writ of certiorari was filed on September 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1975, petitioners, a group health insurance trust arrangement for the benefit of multiple employers, were formed by Thomas Wilkie, who served as trustee (Pet. App. 2). The trust was established pursuant to state law, which required that it be formed as a condition to the

issuance of a group insurance policy. The group insurance policy was sold to petitioners by Insurance Benefits, Inc. (IBI), a company wholly owned by Mr. Wilkie (*ibid.*).

In 1977, the original trust document was redrafted and the single trust was divided into five successor trusts established by five separate trust agreements. The new trust documents provided for a Benefit Committee composed of representatives of the "participating employers" to supervise the operation of the trusts. By contract, however, IBI was retained as administrator of the trusts (Pet. App. 2-3).

Petitioners sought a declaration from the Department of Labor that their trust arrangement for providing group health insurance was an "employee welfare benefit plan" within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* (Pet. App. 11).[1] On July 23, 1979, the Department of Labor informed petitioners by letter that it had concluded that the trust "does not, as an entity, constitute an employee welfare benefit plan." The letter stated (Pet. 3; C.A. App. 17-18) that it was the Department's view that

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[1] 29 U.S.C. 1002(1) provides in pertinent part:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which * * * is * * * maintained by an employer * * * to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits * * *.

29 U.S.C. 1002(5) defines an "employer" as follows:

> [A]ny person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

> where several unrelated employers, in establishing benefit programs for their unrelated employees, without any concerted "sponsor" or "settlor" activity, merely execute identically worded "trust agreements," "subscription agreements," or similar documents offered by an independent third party as a means to fund benefits, no multiple employer plan can be recognized.

Since the trusts involved unrelated businesses, the Department found that each employer has its own separate plan and advised petitioners that they did not qualify as a multiple employer plan subject to ERISA (C.A. App. 18).

2. On August 10, 1979, petitioners filed suit against the Secretary of Labor in the United States District Court for the Central District of California, seeking a writ of mandamus under 28 U.S.C. 1361, ordering the Department to recognize the trust as a plan covered by ERISA (Pet. App. 11).[2] After trial, the district court concluded that petitioners were not an employee benefit plan falling within the scope of ERISA (*ibid.*). This determination rested on grounds different from those cited by the Department in its letter. Unlike the Department, the district court concluded that the employers participating in the trust did constitute an "employer" within the meaning of 29 U.S.C. 1002(1) and 1002(5) (Pet. App. 6). The court was unable to conclude, however, that the power to make final decisions for the trust rested with the Benefit Committee, because under the trust agreement IBI retained substantial authority, and Mr. Wilkie, the owner of IBI, was chairperson of the Benefit Committee (Pet. App. 7-8). The court therefore agreed with the Department's ultimate conclusion that the trust "was not a plan 'established or maintained' *by an employer*" within the

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[2]The complaint also requested a declaratory judgment that the trust arrangement is an employee benefit plan under ERISA (Pet. App. 11).

meaning of 29 U.S.C. 1002(1), but was instead established and maintained by Mr. Wilkie (Pet. App. 6-8; emphasis in original). The court also concluded that the trust was not established and maintained "for its participants or their beneficiaries," as required by 29 U.S.C. 1002(1), because the trust documents permitted inclusion of individuals who are not eligible for plan participation under ERISA (Pet. App. 7-10). Accordingly, the district court dismissed the complaint, thereby denying the petition for a writ of mandamus.

The court of appeals affirmed (Pet. App. 11-12). The court of appeals held that in this case "[t]he Department of Labor exercised its discretion when it issued its opinion letter" (*id.* at 12). Stating that "[m]andamus is not available * * * unless the act to be compelled is mandatory or ministerial," the court of appeals "agree[d] with the district court that mandamus should be denied" (*ibid.*).[3]

ARGUMENT

1. Petitioners contend (Pet. 6-7) that, even though the Secretary had discretion not to issue an opinion letter, he nevertheless had a "mandatory duty" in doing so "to correctly interpret the law." This contention is wholly without merit.

As this Court stated in *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177 (1925), where "discretion extends to a final construction by the officer of the statute he is executing * * * [n]o court * * * can control by mandamus

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[3]The court also "agree[d] with the district court's finding that the power to make final decisions rested in IBI rather than in [the trust]" (Pet. App. 12). Because of the "limited scope of review of a denial of mandamus," the court of appeals concluded that "[t]he other issues raised on appeal are not properly before us" (*ibid.*).

his interpretation, even if it may think it erroneous."[4] Similarly, in *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930), the Court noted that mandamus may not be employed "to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either." See also *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318-319 (1958). Since the Department in exercising its discretion whether to issue an opinion letter did no more than interpret somewhat ambiguous statutory terms with respect to the particular facts of petitioners' plan, the court of appeals correctly concluded that the district court lacked authority under 28 U.S.C. 1361 to order the Secretary to declare that petitioners are an "employee welfare benefit plan." This decision affects no one except petitioners and obviously does not warrant review by this Court.[5]

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[4]The Court has recognized that mandamus is available where an officer is not simply exercising discretion but is acting beyond his authority. See *Work* v. *United States ex rel. Rives*, *supra*, 267 U.S. at 177. Petitioners make no such allegation here.

[5]The disagreement between the district court and the Department of Labor over the reasons to deny ERISA status to petitioners does not, as petitioners imply (Pet. 4-5), constitute grounds for further review. Petitioners filed an original action in the district court and thus the court was not reviewing the validity of the Department's opinion letter. Therefore, the fact that the Department of Labor and the district court reached the same conclusion, but for different reasons, is of no legal significance. Moreover, the court of appeals expressly and properly declined to address these differences, viewing such questions as not properly before it. See note 3, *supra*. See also *Schilling* v. *Rogers*, 363 U.S. 666, 667 (1960) (the Declaratory Judgment Act, 28 U.S.C. 2201, does not confer an independent source of jurisdiction, but presupposes the existence of a judicially remediable right).

Nor is petitioners' claim advanced by their assertion (Pet. 7) that the State of California may conclude that the trust is subject to ERISA and thus not within the State's power to regulate. Petitioners' unfounded fears about what the State may do in the future cannot affect the discretionary nature of the Secretary's decision. Moreover, we note that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the issue of whether petitioners' plan is subject to state regulation may provide them with an opportunity to litigate the scope of ERISA coverage. If the State imposes any requirements more onerous than those in ERISA, petitioners may be able to seek a judicial declaration regarding preemption based on their claims that they should be federally regulated. See generally *Hewlett-Packard Co.* v. *Barnes*, 571 F. 2d 502 (9th Cir.), cert. denied, 439 U.S. 831 (1978).

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